June 10, 1974" a reasonable notice having regard to all the circumstances? On this point I would also respectfully adopt the observations of Danckwerts J. in *Re Barr's Contract*[9] at page 558: —

"... in naming a period which suddenly gives a definite requirement for completion and makes time of the essence in this way, regard must be had to all the circumstances of the case, and to the practical considerations of the ability in the circumstances of the purchaser to find the money, having regard to reasonable behaviour. ..."

In the present case, at the time the agreement was entered into it was not known when the plaintiffs' loan would be approved and released by the bank in question. A deposit of $2,000 was paid by the plaintiff to show good faith and up to April 1974 the defendant was prepared to execute a transfer to enable the plaintiff to secure the release of the bank loan. The letter dated May 30, 1974 was the first intimation the plaintiff received that the balance of the purchase price must be paid within 10 or 11 days. In all the circumstances of this case, I did not consider that a period of 10 or 11 days is a reasonable time. The purchaser has already by his solicitor's letter of June 12, 1974 (see letter at page 38 of agreed bundle of documents marked 'A'), within the not unreasonable period of twelve or thirteen days after receiving the said ultimatum in the defendant solicitors' said letter of May 30, 1974, offered to pay the balance of the purchase price by forwarding a cheque in exchange for the transfer. The plaintiff has asked for specific performance of the said agreement of July 14, 1973. Since the subject-matter of every contract for the sale of land is unique in the eyes of equity, specific performance of such contracts will be available almost as of right (see *per* Farwell J. in *Hexter* v. *Pearce*[11] and in *Rudd* v. *Lascelles*[12]). As the land with the house in question is still in the name of the defendant there would be no injustice in ordering specific performance, and in any case I considered that the court should in all the circumstances of this case exercise its discretion and accordingly made an order that the defendant do specifically perform the said agreement for the sale by her to the plaintiff of the said land comprised in title 529 and known as Lot No. 609 Mukim 18 North-East District, Penang together with house thereon bearing No. 38 Fettes Road, Penang, upon the plaintiff paying the balance of the purchase price amounting to $32,500. I also ordered that the Senior Assistant Registrar of the High Court be empowered to execute the transfer of the said land, etc. on behalf of the defendant and that the defendant pay the plaintiff the costs of this action.

Immediately after I made my above orders, counsel for the defendant applied for stay of execution. I allowed stay pending appeal without requesting both counsel to address me on this point. On reflection I may have erred in allowing stay of execution in view of the fact that the proper plaintiff, a school teacher, instituted this action on September 10, 1973 and has been waiting since then for a decision of the High Court in this matter and for the land and house which he contracted to buy from the defendant nearly seven years ago!

Order accordingly.

Solicitors: *Ajmer Singh Sandhu & Co.; Ho Sen Feek.*

HOTEL JAYA PURI BHD. v. NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS & ANOR.

[O.C.J. (Salleh Abas F.J.) March 9, 1979]
[Kuala Lumpur — Originating Motion No. 90 of 1978]

Administrative Law — Certiorari — Error of law on face of record — Retrenchment of workers — Compensation ordered by court — No legal basis.

Industrial Law — Retrenchment of workers on closure of business — Workers employed for less than three years — Compensation ordered by Industrial Court — No legal basis for payment of compensation — Award quashed — Joining party — Whether party can be joined as respondent and whether award can be made against such party — Hotel and Restaurant — Essential unity of group — Lifting veil of incorporation — Industrial Relations Rules, 1967, rr. 12 & 13 — Industrial Relations Act, 1967, s. 29 & 60G.

Company Law — Lifting the veil of incorporation — Essential unity of group.

In this case a number of workers employed by the Jaya Puri Chinese Garden Restaurant Sdn. Bhd. were retrenched by the Company as the business was closed owing to losses. The restaurant was carried on in premises belonging to the Hotel Jaya Puri Berhad and both the hotel and the restaurant had the same managing director. A dispute arose between the National Union of Hotel, Bar and Restaurant workers representing the workers and the Restaurant and the dispute was referred to the Industrial Court. The Union sought to have the Hotel joined as a party alleging that the workers were the employees of the Hotel and that they were dismissed and not retrenched as alleged by the Restaurant. The Industrial Court in its award found that (1) the workers were employees of the Hotel and not of the Restaurant; (2) the closure of the business of the restaurant was proper and genuine; and (3) the termination of service of the employees was a discharge of workers following the closure of business and not retrenchment as understood and accepted in industry. The court also awarded two months' basic salary and fixed allowances as compensation. The Hotel applied to the High Court to quash the award on the grounds (a) the award against the Hotel was an error in law as under section 29 of the Industrial Relations Act and the Industrial Relation Rules no claim and no award can be made against the party added, although it may make a claim; (b) the Hotel was not the employer of the workers in question and (c) the termination of the workers was retrenchment and no compensation was payable as none of them had completed three years' minimum service.

Held: (1) the Industrial Court has a discretion to add a party as an additional claimant or an additional respondent and if the party is added as a respondent, it can be made subject to the award. In any case the matter is purely procedural and does not affect the jurisdiction of the Industrial Court at all;

(2) the finding of the learned President of the Industrial Court that the Hotel and the Restaurant were in reality one enterprise was in no way against the principle of separate entity and was not unreasonable;

(3) the termination of the service of the workers was proper and there was no legal basis for the award of compensation to the workers. There was an error on the face of the record and the award should be quashed.

Cases referred to:-

(1) *Smith, Stone and Knight* v. *Birmingham Corporation* [1938] 4 All E.R. 116.

(2) *Re F.G. (Films) Limited* [1955] 1 W.L.R. 483.

(3) *Firestone Tyre & Rubber Co.* v. *Llewelyn* [1957] 1 W.L.R. 464.

(4) *Salomon* v. *Salomon & Co.* [1897] A.C. 22.

(5) *Pipraich Sugar Mills Ltd.* v. *Pipraich Sugar Mills Mazdur Union* A.I.R. 1957 S.C. 95.

ORIGINATING MOTION.

V.K. Palasuntharam for the applicant.

D.P. Xavier for the 1st respondent.

S.M. Ratnam for the 2nd respondent.

Salleh Abas F.J.: This Originating Motion is an application by Hotel Jaya Puri Berhad (in this judgment referred to as "the Hotel") for an order of *certiorari* to quash an award made against it on August 1, 1978, by the President of the Industrial Court ordering the Hotel to pay compensation of two months salaries plus fixed allowances in favour of workmen employed in the business of Jaya Puri Chinese Garden Restaurant Sdn. Bhd. (referred to as "the Restaurant").

The Hotel is a company incorporated on November 16, 1973, and the Restaurant is also a company incorporated on July 31, 1974, and is a fully owned subsidiary of the Hotel. There were 56 workers of various categories employed in the business of the Restaurant. These workers are members of a trade union known as the National Union of Hotel, Bar and Restaurant Workers (referred to as "the Union") which was accorded recognition both by the Hotel and the Restaurant on July 12, 1975 and July 3, 1975, respectively. Subsequently, the Union signed two separate three year Collective Agreements with the Hotel on October 30, 1975 and with the Restaurant on February 1, 1976. The Collective Agreements were duly recognized by the Industrial Court in accordance with section 16 of the Industrial Relations Act, 1977, and as such became binding on the parties thereto by virtue of section 17. The business of the Restaurant was carried on at the Hotel's premises which was rented to the Restaurant. The Restaurant commenced business on July 30, 1974 but due to financial losses closed the business on August 31, 1976. Thereafter, the premises was leased by the Hotel to Rodgewood Enterprises Sdn. Bhd. on September 15, 1976 for a three year term at an annual rental of $360,000. Rodgewood Enterprises Sdn. Bhd. use the premises to run a restaurant business under the name of Arc En Ciel. This Company is not in the group of the Hotel and the Restaurant. It is entirely separate.

Following the closure of business by the Restaurant, a dispute arose between the Union and the Restaurant on account of the closure and the termination of service of 56 employees. This dispute was referred by the Minister of Labour to the Industrial Court for its decision on September 7, 1976 and the reference described the dispute as between the Union and the Restaurant *"mengenai penutupan syarikat dan penamatan perkhidmatan pekerja seramai 56 orang."* The reference was subsequently registered in the Industrial Court as Case No. 166/76.

In its statement of case submitted to the Industrial Court, the Union alleged that the workers were employees of the Hotel and that they were dismissed and not retrenched as alleged by the Restaurant. The Union described the dispute as one *"over the dismissal of 44 workers in the Restaurant"*, whose names were furnished in the appendix to the case. The Union asked for their reinstatement or alternative employment without loss of benefits and privileges and in addition thereto payment of full wages, allowances and other monetary benefits from the date of dismissal to that of reinstatement. The Union also asked the court to rule that the collective agreement is binding on the successor, Arc En Ciel Restaurant. The Restaurant, in its statement in reply denied that those workers were employees of the Hotel but that they were the Restaurant's own employees and that they were not dismissed. Their services were terminated because of *"the closure of the business and the ensuing redundancy"*. Subsequently on May 12, 1977, the President of the Industrial Court made an order under section 29(a) of the Act directing the Hotel to be joined as a party. In compliance with a summons (Form L) issued under rule 12 dated May 12, 1977 and a request to submit statement in reply (Form J) under rule 10(1) dated August 1, 1977, the Hotel through its counsel appeared before the Industrial Court and submitted the required statement in reply. The substance of the reply by the Hotel was that the Industrial Court had no jurisdiction over the Hotel because (1) the workmen in question were not employees of the Hotel but those of the Restaurant, and (2) these workers were not dismissed but retrenched.

The Industrial Court heard the evidence of two witnesses: (1) Lim Fan Saw, Secretary-General of the Union, and (2) J.M. Gabriel, Personnel and Welfare Manager of both the Hotel and Restaurant. A number of documents were tendered to the court, of which the most important are letters of appointment of 40 employees sorted out in 3 bundles, Bundle A for 18 employees, Bundle B for 14 employees and Bundle C for 8 employees.

On August 1, 1978, the learned President handed down a written award of the case. In the award he found that (1) the employees in question were those of the Hotel and not of the Restaurant, (2) the closure of business was proper and genuine, (3) the termination of service of these employees was a discharge of workmen following the closure of business and not retrenchment as understood and accepted in industry, there being a distinction between the two. In view of these findings, the President considered that the Industrial Court "has a duty to find out whether compensation, if any, has to be paid to the workers", and finally concluded that two months' basic salary and fixed allowances as compensation would not be unreasonable. Thus an award was accordingly made as follows: —

"(1) the compensation to be paid should be two (2) months' basic salary and fixed allowances, if any, based on their last drawn basic salary and fixed allowances;

(2) if the workers or any of them have received payment from the Hotel or the Restaurant, those amounts should be set off against the sums or sum due to them or him;

(3) the Hotel to make such payment on or before 30th August 1978."

It is this award that I am now being urged by counsel for the Hotel to quash by an order of *certiorari*. He gave the following grounds in support of this motion, i.e.: —

(a) The award made against the Hotel is an error in law, because by virtue of section 29 of the Act and the Industrial Court Rules, 1967 no claim and so no award can be made against the party added, although it may make a claim;

(b) The Hotel is not the employer of the workers in question.

(c) The termination of service of these workers is retrenchment, and as such the matter of compensation should be governed by Article 25 of the Collective Agreement and sections 60G and 60H of the Employment Ordinance, 1955. Under either or both of these, the workmen are not entitled to any compensation as none has completed the 3 years' minimum service laid down by the article and the section.

Taking the first ground, I am of the view that there is no merit in the argument that the combined effect of section 29 of the Act and rule 12 and rule 13 of the Industrial Court Rules, 1967 (P.U. 406) is that a party added or joined can make a claim only and that neither claim nor award can be made against it because under rule 12 the party added is only issued with a summons to appear and under rule 13 such party is only required to submit a statement of case, and not a statement in reply or rejoinder. In my judgment, such an argument, if allowed to prevail, limits the provision of section 29 itself rather than gives full effect thereto. This section says: —

"29. The court may, in relation to any trade dispute before it or in relation to any reference to it under section 20(3) — (a) order that any party be *joined*, substituted or struck."

It is clear that the Industrial Court's power to order any party to be joined, is not limited in any way by merely ordering an additional claimant to be joined. From this section the Industrial Court has a discretion to order a party added to be joined either as claimant or respondent as the court thinks fit. It is true that rule 13 seems to contemplate that an added party is required to make a statement of case only which is: —

"Upon a party being joined or substituted, he shall submit to the court a *Statement of Case* and the provisions of Rule 9 (Statement in Reply) and Rule 11 (Rejoinder) shall apply *mutatis mutandis*."

This rule cannot be read to limit the scope of section 29(a) of the Act which allows the party added to be either a claimant or a respondent. The requirement to make a statement of case does not necessarily mean that such party can only become a claimant. Whether he could become a claimant or respondent depends upon the nature and substance of the statement.

If it is in the nature of defence avoiding the remedy being sought by the existing claiming party, I see no reason, in view of the wide discretion given to the Industrial Court by section 29(a), why such party cannot be treated as a respondent and if necessary be a party to the award. Of course, the matter would have been perfect and beyond any technical defect if the draftsman were to write this rule by making a distinction between a party being joined as an additional claimant and an added party being joined as an additional respondent; in the case of the former a statement of case is required, and in the case of the latter a statement in reply has to be submitted. However, the fault of the draftsman can in no way limit the power of the Industrial Court as given by the legislature in section 29(a) of the Act. The most that a scrutinizing eye could say is that as regards a party added which is treated as an additional respondent, the Industrial Court Rules make no provision; but this shortcoming cannot impede or frustrate the proceeding before the court because already under section 28 the President has the power to "regulate the procedure and proceedings of the court". Even the Industrial Court Rules, 1967, themselves were made under this section by the President with the approval of the Minister. Surely where the standing rules made under this section do not make provision to cover any specific matter, the power to "regulate the procedure and proceedings" can lawfully be invoked.

The ingenuity of counsel to argue on technicality has indeed earned my admiration. He submitted that since the reference by the Minister described the dispute as between the Union and the Restaurant, the party added cannot be made subject to the award. Frankly, I find it difficult to accept this argument, because it means that power of the court to order any party to be joined or substituted or struck off would be meaningless. Subsections (5) and (6) of section 30 of the Act should be a complete answer to this exercise in legal technicalities. In subsection (5) the court is required in the making of award "to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form", whilst in subsection (6) the court is required to include "any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3)". These two subsections are wide enough to include power to make an award against a party added so long as such party has been given opportunity of being heard; and this is what section 29(a) is for. They clearly show that the legislature enjoins the court to get on with the case before it without being encumbered by procedural technicalities and defects.

Hence I agree with the President that the submission of counsel for the Hotel on this point must fail, as the matter is purely procedural and does not affect the jurisdiction of the Industrial Court at all.

The second ground on which the learned counsel for the Hotel urged me to quash the award is that the President made an error in law when he made a finding that the Hotel was the employer of the workers in question because the Hotel and the Restaurant are in law separate entities. He cited to me as well as before the President a number of cases on the principle of separate entity in company law. However, in his award, the President approached the problem as follows: —

"Encik Palasuntharam cited a number of authorities on company law and the separate legal entity of a subsidiary. While this may be the position under company law or at common law, the claim of the Union is founded under the provision of the Act and the authorities cited are not strictly relevant. The essence of the Union's case is that though the restaurant is a separate legal entity under company law, the real employer is the Hotel if one takes into consideration the whole of the oral and documentary evidence before the court. The court has to place greater emphasis on equity and good conscience than on legalistic principles when determining the questions relating to unfair labour practices."

Taking this statement as a starting point, the President then made a number of findings as follows: —

(1) The Hotel and the Restaurant were inter-dependent;

(2) There was a functional integrality and unity of establishment between the Hotel and the Restaurant. In other words, functionally the Hotel and the Restaurant are in fact one integral whole and management-wise they also constitute a single unit. Dato' N.A. Kularajah who is the Managing Director for both the Hotel and the Restaurant, although later he became only the Director of the Hotel, "had the ultimate authority over the employees working for the Restaurant".

(3) A number of senior officers such as the Secretary, Personnel Manager and Assistant Manager were common both to the Hotel and the Restaurant.

(4) 32 employees whose letters of appointment are those in Bundles A and B were appointed by the Hotel although 8 employees whose letters of appointment are in Bundle C were appointed by the Restaurant.

Thus taking all these findings into consideration, the President said: —

"in the light of all the above, the court concludes that *in the peculiar circumstances of this dispute* the Hotel is the employer of the workers in question."

I am now being asked by the learned counsel to interfere with the award on the ground that this finding is an error in law sufficient to quash the award. For my part, I wish to approach the problem from the point of view whether this finding i.e. the finding that the Hotel is an employer, is unreasonable and cannot be supported by either law or facts.

It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or vice versa as was decided in *Smith, Stone and Knight* v. *Birmingham Corporation;*[1] *Re F.G. (Films) Limited;*[2] and *Firestone Tyre & Rubber Co.* v. *Llewelyn.*[3] Professor Gower in his Principles of Modern Company Law, 3rd Edition, Page 213, said that the courts

"are coming to recognise the essential unity of a group enterprise rather than the separate legal entity of each company within the group. Other examples of this can be found. In *The Roberta* (1937) 58 Ll. L.R. 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the court saying that the subsidiary was 'a separate entity... in name alone and probably for the purposes of taxation'. In another case, *Spittle* v. *Thames Grit & Aggregates Ltd.* [1937] 4 All E.R. 101, the court found no difficulty in treating a subsidiary as 'to all intents and purposes' the same as the parent company which held 90 per cent of its shares. A licensing authority in exercise of its discretion has been held entitled to have regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd.* v. *British Transport Commission* [1962] 2 Q.B. 173, Devlin L.J. at page 202)... A good example of this is *Bird & Co.* v. *Thos. Cook & Son* [1937] 2 All E.R. 227, in which an indorsement of a cheque to 'Thos. Cook & Son Ltd.' was treated as an indorsement to the allied but separate company of Thos. Cook & Son (Bankers) Ltd. by regarding it as a mere misdescription to be ignored under the principle *falsa demonstratio non nocet.*"

It is clear therefore that the approach taken by the President of Industrial Court is not without any legal support when he placed an emphasis on the essential unity of group enterprise which in this case consists of the Hotel and the Restaurant, especially when Datuk N.A. Kularajah who is the Managing Director of the Hotel was also the Managing Director and later a Director of the Restaurant and had the ultimate authority over the employees. Thus, the practice of treating the employees of the Restaurant as being separate from the employees of the Hotel such as the Union having been told that they were so, their salaries, their E.P.F. and SOCSO contributions being paid by the Restaurant, does not detract from the fact that the employees in question were in fact working in one group enterprise. In my judgment, by giving recognition to this fact, the President did not cause any violence to the sanctity of the principle of separate entity established in *Salomon* v. *Salomon & Co.*[4] but rather gave effect to the reality of the Hotel and the Restaurant as being in one enterprise. I find nothing unreasonable in the finding of the President by by-passing this principle. He did no more than to comply with the wishes of the Legislature that in the making of an award substantial merits of the case, the public interest and any matters which are necessary or expedient for the purpose of settling the dispute are among the factors which should be taken into consideration by the court. In my view, the finding by the President is in no way against the principle of separate entity and I am therefore not prepared to interfere with the award on this account.

Counsel for the Hotel urged very strongly that the Industrial Court made such finding without considering letters of appointment in Bundle C where, on the face of these letters the appointments were made by the Restaurant. He also submitted that as regards employees whose letters of appointment are in Bundle A and Bundle B, though they may be appointed by the Hotel, it could be inferred from the circumstances that there was a novation of their contracts of service with the Restaurant. He said that the Industrial Court should have come to the conclusion that the employer of these workers was the Restaurant because the Union was so told and the workers were treated as being employed by the Restaurant in that their wages, E.P.F. and SOCSO contributions were all paid for by cheques drawn on the Restaurant and above all the Restaurant claimed that it was the employer. To my mind, as the Industrial Court recognised and accepted the importance of the essential unity of the group enterprise, i.e. the Hotel and the Restaurant as being in one group, it does not matter really who the employer is: the Hotel or the Restaurant, and so these matters which counsel said should have been taken into consideration, but were not, became no longer important. As I have said earlier, I do not consider therefore that such approach which leads to this finding by the President is unreasonable.

The next point which I have to consider is the basis how and why the President gave an award of compensation of two months' salary and fixed allowances against the Hotel. I tried to find the basis why compensation is paid at all. If there is a legal

basis for paying the compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under section 30 of the Industrial Relations Act to fix, but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application. As to this, the President said as follows: —

"The court has a duty to find out whether compensation, if any, is to be paid to the workers. The court is inclined to agree with Encik Xavier that a distinction should be made between termination of service following closure of business and retrenchment on the ground of redundancy. The termination here will therefore not come under Article 25 of the Collective Agreement between the Hotel and the Union which the Article clearly relates retrenchment on the ground of redundancy. However, in keeping with the authority cited by Encik Palasuntharam, there can be no question of reinstatement, and in view of the earlier finding of proper closure, the court thinks two months' basic salary and fixed allowances, if any, would not be unreasonable."

Clearly there is no legal basis whatsoever why and how the President decided that compensation should be paid. The termination of service of these workers according to his finding was as a result of the proper closure of the business of the Restaurant. There was no blame against the Restaurant or the Hotel for closing the business because it was entirely their prerogatives. Therefore, the termination of service of the workers was also proper. There is not one word in the award which goes on to say that the termination of service of these workers was either illegal or even wrong or improper. It is recalled that in its statement of case the Union alleged that these workers were dismissed. Paragraph 2 of the statement of case said —

"The dispute is over the *dismissal* of 44 workers in the Restaurant. Their names are furnished in an appendix annexed hereto and marked N.U.H.1."

And in paragraph 8 the Union claimed that

"such dismissal by the Restaurant is null and void and will be of no effect and the said dismissed workers are deemed in law to be not dismissed at all."

The allegation of wrongful dismissal was denied by both the Restaurant and the Hotel. The President made no finding whatsoever on the question of dismissal as it appeared that the Union during the course of the proceeding had abandoned this point. Indeed as the closure of business was perfectly legal and proper, the termination of service of these workers can never be dismissal. Hence the compensation ordered by the award could not be on the basis of dismissal.

Could this compensation be held to be retrenchment benefits. As to this, the matter is clearly governed by Article 25 of the Collective Agreements between the Union and the Hotel. This article is as follows: —

"*ARTICLE 25 — REDUNDANCY & RETRENCHMENT*
Clause (a) Any employee who has completed not less than three (3) years continuous service with the company is terminated for reasons of redundancy or retrenchment of staff shall be entitled to thirty (30) days' basic salary for every completed year of service.

Clause (b) The company shall give written notice of retrenchment to employees ont later than two (2) months before the date on which their employment is to be terminated. The principle of 'last in first out' should be followed within each category of employees."

Thus, in its application to this case, none of the workers involved would be entitled to retrenchment benefits because none of them had a three year minimum service so as to qualify for retrenchment benefits provided for under that article. The provision of this article is more or less the same as the provision of section 60G of the Employment Ordinance which is as follows: —

"60G. No labourer who has been in continuous service with an employer for less than three years shall be entitled to any retrenchment benefit on the termination of his service by the employer on the ground of redundancy or by reason of any reorganisation of the employer's profession, business trade or work."

This section was repealed on January 1, 1977 but such repeal did not affect the case because the dispute took place in 1976. Even if the court were to hold that these workers were the employees of the Restaurant instead of the Hotel, the matter of retrenchment is governed by a Collective Agreement between the Union and the Restaurant which is identical with the Union/Hotel Collective Agreement. Thus they are also not eligible to retrenchment benefits from the Restaurant for similar reason — lack of three years' minimum service.

In its award the Industrial Court considered that the termination of service of these workers was not retrenchment, but a "discharge of workmen following closure of business". As an authority for such distinction, the Industrial Court relied on a passage in the case of *Pipraich Sugar Mills Ltd.* v. *Pipraich Sugar Mills Mazdur Union*,[5] as follows: —

"Retrenchment connotes in its ordinary acceptation that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplusage. The termination of services of all the workmen as a result of the closure of the business cannot, therefore, be properly described as retrenchment. Though there is discharge of workmen both when there is retrenchment and closure of business, the compensation is to be awarded under the law, not for discharge as such but for discharge on retrenchment, and, as retrenchment means in ordinary parlance, discharge of the surplus, it cannot include discharge on closure of business."

In my view, as the court holds, as it did in this case, that the employees were the employees of the Hotel because the Restaurant was part of the Hotel's business on account of the unity of function and establishment, surely the proper application of the principle enunciated in *Pipraich* case is that there was a retrenchment of workers who became redundant or surplus, due to the limitation of the business activities of the group enterprise. I cannot logically see that such termination would amount to a discharge of workers when only the business of Restaurant was closed down. The proper application of the principle in *Pipraich* case should be that only when the businesses of both Hotel and Restaurant were closed can we say that the workers were discharged. It seems to me that in deciding whether termination of service is discharge or retrenchment, the Industrial Court abandoned the very same approach of group enterprise unity which it emphasised so much in its finding on who the employer of these workers was. This double standard approach is inconsistent, especially when the court said that the employer is the Hotel "which is still carrying on business and is therefore not dead." If not dead, why treat the workers as being discharged

and not retrenched? Even assuming that the court was right in holding that the termination of service is discharge, what is the legal basis for the compensation so awarded? There is nothing in the legislation nor in the Collective Agreements. I do not consider that sections 28, 29 and 30 of the Industrial Relations Act are wide enough to authorise the court to create legal rights and duties between the parties to the dispute or the party added subsequently. Hence I agree with counsel for the Hotel that compensation awarded is illegal. It seems that the workers raised the dispute because they thought that they ought to be compensated for loss of employment, but this "ought" is not a matter which is provided for by the law or by the Collective Agreement, and I do not think that the Industrial Court can supply the gap short of legislation. That being the case, however much I am in sympathy with this workmen for the loss of employment, in my view, there is clear error of law on the face of record. I therefore allow this application and quash the award accordingly. I also order that the cost of proceedings before me be paid by the 1st respondent.

Order accordingly.

Solicitors: *V.K. Palasuntharam; D.P. Xavier & Co.; S.M. Ratnam.*

NANTHAKUMARAN v. JAFFNESE CO-OPERATIVE HOUSING SOCIETY LTD. & ORS.

[O.C.J. (Mohamed Azmi J.) March 21, 1979]

[Kuala Lumpur — Civil Suit No. 1423 of 1978]

Practice and Procedure — Application for injunction against Registrar of Titles, Kuala Lumpur — Notice in lieu of service — Unsealed copy of notice — Irregularity curable — No injunction can be granted against Government officer — No interim declaratory order can be made — R.S.C. 1957, O. 1A r. 3 and O. 70 — Specific Relief Act, 1950, s. 54(d) — Government Proceedings Ordinance, 1956, s. 29(1).

Administrative Law — Application for injunction against Registrar of Titles, Kuala Lumpur — No injunction can be granted against Government officer — No interim declaratory order can be made — Specific Relief Act, 1950, s. 54(d) — Government Proceedings Ordinance, 1956, s. 29(1).

Land Law — Order against Registrar of Titles — Can only be made after judgment — National Land Code, s. 417(1).

In this case the dispute related to the allocation of a housing lot to the plaintiff. The plaintiff alleged that he was given land on a slope and of a smaller size than that given to the second and third defendants by the first defendant. He applied for re-adjustment of the lots or for levelling of the land. He applied by notice of motion for an order that the fourth defendant, the Registrar of Titles, Kuala Lumpur, do cease and desist from issuing separate titles for the lots pending the final disposal of the suit. The fourth defendant raised preliminary objections on points of law.

Held: (1) although an unsealed copy only of the notice in lieu of service was served on the fourth defendant, the defect was an irregularity which could be cured by order 70 of the Rules of the Supreme Court;

(2) the court could not grant an injunction against the fourth defendant who is a Government officer. The court could only grant a declaratory order but even if the notice of motion was amended no interim declaratory order could be made;

(3) an order under section 417(2) of the National Land Code can only be made after judgment has been given by the court.

CIVIL SUIT.

A. Kanesalingam for the plaintiff.

S.D.K. Peddie for the 1st defendant.

C. Thambiah for the 2nd defendant.

P.S. Moorthy for the 3rd defendant.

Fong Seng Yee (Federal Counsel) for the 4th defendant.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an application by notice of motion dated May 8, 1978 by the plaintiff for an order that the fourth defendant do cease and desist from taking any further steps in connection with the issuance of separate titles whether they be qualified titles or final titles for Lots 9902, 9903 and 9904 pursuant to sub-division of the main title Geran No. 19476 for Lot 9769 Mukim of Petaling, pending the final disposal of the suit.

From the pleadings and affidavit of the plaintiff sworn on May 8, 1978, the plaintiff is a member of the first defendant Co-operative Housing Society. The dispute in this suit is regarding allocation of housing lot to the plaintiff. The statement of claim alleges that the land allotted to the plaintiff is on a slope, whereas the second and third defendants who are also members of the Co-operative Society are given lots which are flat lands. It is also alleged that the land allotted to the plaintiff (Lot 9902) only has an area of 39,595 square feet; whereas the piece allotted to the second defendant (Lot 9903) has an area of 52,305 square feet, and the piece to the third defendant (Lot 9904) enjoys an area of 51,921 square feet. Accordingly, the plaintiff claims, *inter alia,* for an order that the boundary of Lot 9902 allotted to him be set back 40.13 links towards the second defendant's Lot 9903, and that the other boundary of Lot 9903 be moved 20 links into the third defendant's Lot 9904, so that the three pieces of land would have more or less the same size. Alternatively, the plaintiff prays for an order that the Co-operative Society do forthwith level the plaintiff's land by filling up all the slope and construct a retaining wall to support the fill-up area.

It should be observed at the outset that the fourth defendant is not really a party in the dispute between the plaintiff and the other three defendants. Be that as it may, in the present application, the plaintiff in reality is seeking for an interim injunction to "cease and desist" the fourth defendant from issuing separate titles in respect of the three lots of land which form the subject-matter of the plaintiff's claim. By paragraph 21 of the plaintiff's affidavit, it is averred that, if the separate titles for Lots 9902, 9903 and 9904 are issued by the fourth defendant, the plaintiff will not be able to avail himself of the remedy that the boundary lines of the three lots should be shifted. By paragraph 22 of the affidavit, the plaintiff prays for the injunction order to restrain the fourth defendant from issuing the separate titles under section 417 of the National Land Code.